



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 13, 1996

Mr. Richard J. Ybarra
Open Records Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR96-0690

Dear Mr. Ybarra:

On behalf of the Office of the Attorney General (the "OAG"), you have asked this office to reconsider Open Records Letter No. 96-0342 (1996). Your request for reconsideration was assigned ID# 39570.

The Natural Resources Division of the OAG received a request for the following information about a particular site:

- 1) All enforcement-type documents which the Attorney General's office has issued concerning [that] site;
- 2) Any documents concerning investigation(s) that the Attorney General's office may have conducted concerning [that]; and
- 3) Any and all correspondence to and from the Attorney General's office and Pennwalt Corporation concerning [that] site.

In Open Records Letter No. 96-0342 (1996) we concluded that all responsive information was presumed to be public because the OAG failed to seek an open records decision within ten days of receiving the request for information as is required by section 552.301(a) of the Government Code. In your request for reconsideration you have provided us with information to demonstrate that you did in fact request an open records decision from us within the required ten days. You have also resubmitted to us all responsive documents for which you initially sought exemption from disclosure. Accordingly, we will now consider the discretionary exceptions to disclosure that you raised in your original request for a decision.

You maintain that the documents you have resubmitted to us are excepted from required public disclosure under sections 552.107 and 552.111 of the Government Code. Section 552.107 excepts information from disclosure if:

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions. Open Records Decision No. 574 (1990) at 5. However, section 552.107(1) does not protect purely factual information unless the factual information constitutes a confidence that the client related to the attorney. *See id.* at 5.

Section 552.111 excepts from disclosure an interagency or intraagency memorandum or letter that would not be available to a party in litigation. This exception applies to a governmental body's internal communications consisting of advice, recommendations, or opinions reflecting the policymaking process of the governmental body at issue. *See* Open Records Decision Nos. 631 (1995) at 3, 615 (1993) at 5. Section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of the communication. As section 552.111 generally protects only advice, opinion, and recommendations, any protection under section 552.111 will usually be no greater or less than the protection offered under section 552.107. *See* Open Records Decision No. 574 (1990) at 2. However, the preliminary draft of a policymaking document that has been released or is intended for release in a final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 (1990) at 2.

The documents you have asked us to consider can be divided into four categories. First, we consider the internal memoranda from the Texas Water Quality Board (now known as the Department of Water Resources). We agree that the memoranda relate to the policymaking function of the Department of Water Resources. Therefore, the advice and opinion portions of the memoranda are excepted from disclosure under section 552.111. However, the memoranda contain severable facts that are not protected by section 552.111. We have marked the first category of documents to indicate which information you may withhold.

These memoranda were "received by [sic] OAG in the course of the attorney-client relationship and are advice and opinion in an intra-agency memorandum or letter pertaining to a policy matter." Merely transferring information from a governmental body to the governmental body's attorney does not bring the information within the protection of section 552.107(1). *See* Open Records Decision No. 574 (1990) at 4.

Moreover, you have not asserted that these documents constitute confidential communications from a client to its attorney. However, one memorandum appears on its face to be a confidential communication from a client to its attorney. Thus, only this memorandum is excepted from disclosure by section 552.107(1).

Second, we consider the letters between the OAG and the Water Quality Board. Portions of these letters constitute the advice of the OAG to its client, the Water Quality Board. Therefore, the advice portions of these letters are excepted from disclosure under section 552.107(1). The letters also contain basic factual information that is protected by section 552.107(1) to the extent that these facts consist of client confidences communicated to an attorney. We have marked those portions of the letters that are excepted from disclosure under section 552.107(1).¹

Third, we determine whether OAG attorneys' draft documents are excepted from disclosure. As you have not indicated that the OAG released or intended to release final drafts of these documents, they are not excepted from disclosure in their entirety under section 552.111. Only the advice and opinion portions of these drafts are protected from disclosure under sections 552.107(1) and 552.111. Neither of these provisions excepts the factual portions of these drafts from disclosure. We have marked the draft documents accordingly.

Finally, you have submitted documents that are comprised either entirely of an OAG attorney's notes or are drafts that contain an attorney's notes in the margins. You have released a "clean copy" of these draft documents to the requestor and therefore seek protection only for the attorneys' notes on these documents. To the extent that the attorneys' notes constitute advice or opinion, the notes are excepted from disclosure under sections 552.107(1) and 552.111. We have marked these documents accordingly.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

¹We note that section 552.111 affords the same protection for these letters as section 552.107(1).

Ref.: ID# 39570

Enclosures: Marked documents

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